No. 840

In the Supreme Court of the United States

OCTOBER TERM, 1946

MYRL ALEXANDER, WARDEN, PETITIONER

v.

UNITED STATES EX REL. JOHN MYRON KULICK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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If the Court holds that the habeas corpus court had power to inquire into the jurisdiction of the selective service boards, there is presented an additional question which is not discussed in petitioner's opening brief, and which therefore requires reply.

As one basis for attacking the jurisdiction of the board of appeal, respondent urges that there is no evidence to support the refusal of the board to classify him as a minister, and our opening brief answers this argument. But respondent also urges that the local board deprived him of a "full and fair hearing," because "the undis-

puted evidence showed that the local board failed to reduce to writing and place in the prisoner's file[1] vital oral evidence submitted by him at a personal appearance [on August 30, 1944] relative to his status under the Act" (Br. 131).

Respondent here made no such allegation in his petition for a writ of habeas corpus, nor, as the record before the habeas corpus court indicates, did he adduce any such proof at the habeas corpus hearing. Indeed, the only evidence adduced at the habeas corpus hearing bearing on the administrative proceedings was the selective service file and that was submitted by the petitioner (R. 40). There is nothing in the file which shows that respondent adduced oral evidence before the board which was not summarized in writing.

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[1] Section 623.2 of the Selective Service Regulations (9 Fed. Reg. 437–439) provides:

"* * * The registrant's classification shall be made solely on the basis of the Selective Service Questionnaire (Form 40), Affidavit of Dependent Over 18 Years of Age (Form 40A), Affidavit—Occupational Classification [General] (Form 42), or Affidavit—Occupational Classification [Industrial] (Form 42A), and such other written information as may be contained in his file * * *. Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file."

Section 627.13 (b) (8 Fed. Reg. 16720) provides, *inter alia*, that "if any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts."

For the purpose of enabling the habeas corpus court to know "what has gone on in the Southern District of New York," petitioner also placed in evidence a transcript of the proceedings in the criminal trial (R. 37–39). While the transcript has probative value in showing the proceedings in the criminal trial and is material to the issue whether the convicting court deprived respondent of his right to defend, the testimony at the trial, of course, is of no probative value in the habeas corpus proceeding in respect of the proceedings before the selective service boards.

Respondent, however, seems to have assumed that the evidence adduced in the criminal trial is also evidence in the habeas corpus proceeding, notwithstanding that the witnesses did not appear in the habeas corpus court. Respondent's statement refers liberally to facts which were adduced only in the criminal proceeding, and his contention that the local board failed to reduce oral evidence to writing similarly rests only upon testimony adduced at the criminal trial.

Thus, at the criminal trial a member of the local board was called as a defense witness and he was interrogated concerning the hearing before the board on August 30, 1944. He testified (Tr. 68–69) that when the board reclassified respondent from IV–D to I–A, it did not act arbitrarily, and that thereafter on August 30, 1944—

> The boy appeared before the board, and in his own way we asked him what he did,

> and he told us he was a professional model which required him to wear the United States Army uniform at times. We asked him, as I recall, how much time he gave to his ministerial duties, and the time he gave and the time he spent in making his livelihood did not jibe, so we concluded that most of his time was spent working as a professional model and very little time given to his duties as a minister.

It appears from the selective service file that at the conclusion of the August 30 hearing the board placed the following statement in the file:

> When registrant appeared it was learned after interrogation that he was an artist model—and has been photographed in military uniform; when further questioned concerning C. O. in military uniform his reply was evasive.

When respondent took the witness stand at his criminal trial, he testified (Tr. 106–119) that he had furnished extensive oral information to the board at the August 30 hearing, including information concerning the activities of the Jehovah's Witnesses Sect, his activities within the sect, the scriptures upon which he predicated his ministerial claim, his work as a model, and the reasons why his name was not included on the list of ministers furnished the Selective Service System by the Watchtower Bible and Tract Society. The Government previously had

urged, and the court agreed, that the defense of illegal classification was not open to respondent in the criminal trial; accordingly the Government did not cross-examine respondent concerning this testimony and did not adduce evidence in answer to respondent's testimony in this respect.

On this state of the record in the criminal trial respondent now contends (Br. 131–137) that he has established that the local board failed to summarize in writing all of his oral statements at the board hearing, and that it therefore deprived him of procedural due process. In our view, if respondent desired to make this contention, it was his responsibility to allege it in his petition for a writ of habeas corpus and to adduce direct proof in the habeas corpus court in support of his allegations. The present attempt to rely upon his testimony at the criminal trial as though the same testimony had been given at the habeas corpus hearing is without justification. Quite plainly, the record of the criminal trial does not reflect a complete picture of the events before the board on August 30; it shows only respondent's version. For the matter was not in issue in the criminal trial and the prosecution therefore made no effort to answer respondent's evidence.

Similarly, in the habeas corpus proceeding the petition did not place in issue the question

whether the board failed to reduce oral evidence to writing and petitioner, of course, made no effort to answer an issue which was not there. It is true that the opinion of the habeas corpus court refers to the facts shown by the transcript of the criminal trial and rejects respondent's contention (R. 69), but the court was no more warranted in deciding an issue on which there was no direct evidence before it than is respondent in relying on his testimony at the criminal trial.

Even assuming, *arguendo*, that the question is open on the present record, we think respondent's contention must fail. For, if the memorandum of the August 30 hearing (*supra*, p. 4) is inaccurate, the inaccuracy was subsequently cured by respondent. As we point out in our main brief (p. 5), Section 627.12 of the Selective Service Regulations provides that a registrant who takes an appeal to his board of appeal—

> may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.

When respondent took his appeal to the board of appeal he availed himself of this privilege. On September 8, 1944, he submitted a statement on appeal setting forth the various considerations in support of his claim to exemption as a minister of religion. It is a fair assumption that respondent's statement on appeal presented his case to the board of appeal in the light most favorable to him and included such information as respondent believed vital to his claim. Thus, the information which respondent relies upon was before the board of appeal, and there is nothing in the record which suggests that it was not fully considered by the board of appeal. If the local board failed to reduce to writing oral evidence furnished by respondent, the defect is at the very worst a mere technical deficiency. For the information found its way into the record through the statement on appeal which respondent filed. Respondent thus has not suffered a procedural irregularity "of such a nature or magnitude as to render the hearing unfair." See *Eagles* v. *Samuels*, No. 59, this Term, decided December 23, 1946.

The Fourth Circuit has rejected the argument that the failure to file a statement on appeal constitutes a failure to exhaust an available administrative remedy. *Smith* v. *United States*, 157 F. 2d 176, 183, certiorari denied, November 12, 1946 (No. 534, this Term). But the present case is one where the registrant availed himself of the

remedy and thereby cured what might have been a defect in the administrative record:

Respectfully submitted.

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